

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4524 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DIPAK MANGALDAS PRESSWALA

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioner

Mr. S.P. Dave, APP for Respondent No. 1

MR DR DALAL for Respondent No. 2

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 28/09/98

ORAL JUDGEMENT

By this application, the petitioner who is accused No.2 in Criminal Case No. 6998 of 1992 filed by the State Bank of Saurashtra - opponent No.2 relating to the offences punishable under Section 406, 420, 421, 422, 424 & 427 read with Section 34 of the Indian Penal Code and at present pending before the Court of the Judicial Magistrate (F.C.) at Surat, prays for quashing of the same.

2. Few facts may be stated. The petitioner and

Geetaben Dipakbhai - accused No.3 in the complaint are husband and wife. Arunkumar Mangaldas Presswala joined as accused No.5 is the brother of the petitioner, while Shri Uday K. Dalal joined as accused No.4 was their family friend. They all were the Directors of the company called "M/s. Jigma Synthetics Pvt.Ltd.", joined as accused No.1 in the case. At the request of the petitioner and other directors of the company on 15th March 1988 credit facilities were granted by the opponent No.2 who is the complainant. Cash Credit Limit against hypothecation of raw materials in process and finished goods of art silk yarn cloth, colour, chemicals, spares, packing materials and book-debt claim etc., was Rs. 40,00,000/- while, Medium Term Loan Limit against the hypothecation of plant, machinery, art silk yarn sizing and leasing etc., was upto Rs. 45,00,000/-, and L.C. Limit was upto Rs. 12,00,000/-, over and above the Bank Guarantee of Rs. 2,00,000/-. The company was managed by the Board of Directors inclusive of the petitioner and they were signing and presenting on behalf of the company the correspondence, cheques, stock statements, bills, documents, contracts etc., relating to the credit facilities and advances granted to the company. They personally guaranteed the repayment of the dues from time to time together with agreed interest, costs etc., and executed the guarantee deeds on 15th March 1988. The goods, plant, machinery, spare-parts, finished goods, processors, machineries, silk yarn, cloth etc., were given in hypothecation to the bank by way of security qua the payment of the advances by the company. The petitioners and other directors who are joined as accused in the complaint were handed over the possession of the abovestated goods and machinery and were allowed to retain the same and have a dominion over the same, but it was on the strict trust for specific purpose of enabling the accused to run the factory for processing activities. The accused had also undertaken to furnish true and correct statements periodically. The accused had to route the company's sales and purchases through the cash credit account only and were bound to credit the sale proceeds and/or realisation of the hypothecated goods etc., in the said cash credit account only but subsequently few months after creating the confidence the accused in collusion with each other dishonestly and fraudulently started submitting the statements of the books and book debts irregularly and also stopped sending the same since 15th August 1989 upto 31st August 1990. They have dishonestly submitted the false statements showing inflated values and quantity of goods, book debts etc., and made representation intentionally and knowingly false with a view to mislead and deceive the bank. The accused later

on keeping the bank in dark started to deal with the goods, production etc., and there was therefore no credit entry in any of the accounts even though several months had passed. The accused had consistently avoided showing verification of any record relating to the goods and books of accounts, bills etc., despite numerous reminders, telephones, meetings and personal visits by the bank officers. They also did not account for the goods and their sale proceeds and now realisation of the book debt running into lakhs of rupees. The same have been disposed of in a clandestine manner and have siphoned off the proceeds instead of crediting the same in cash credit account or T.L. A/c. Thus in absolute and open breach of trust and violation of the direction qua credit agreement, they misappropriated and converted to their own use wrongly gained amounts and thereby caused wrongful loss to the tune of lakhs of rupees to the bank by unlawful means. By committing continuous criminal breach of trust they have caused alarming wrongful loss by knowingly avoiding the value and utility of bank securities by continuous use of machinery and thereby they have committed the offence under Section 427 also. The complaint for the above stated offences stating such facts when presented before the learned Judicial Magistrate (F.C.) at Surat, the statement on oath of Tulsilal Gandhalal Sathani serving as Manager, State Bank of Saurashtra, Begumpura, Surat was recorded. Perusing the same, the learned Magistrate was pleased to issue the process for the offences alleged registering the complaint. The accused inclusive of the petitioner were served with the summons issued by the learned Judicial Magistrate at Surat. They appeared before the court. Perusing the papers given to the accused and also the copy of the complaint they found that in fact no case amounting to any of the commission of the criminal wrong was made out. Hence one of the accused has preferred this application for quashing the complaint.

3. The learned advocate representing the petitioner contends that on going through the complaint no case to proceed against either of the accused inclusive of the petitioner is made out. In fact it can be termed a civil wrong and for realisation of the amounts the bank has filed Special Civil Suit No. 43/91 in the Court of the Civil Judge (S.D.) at Bharuch. It is also clarified while making contention by Mr. Shah, the learned advocate that the place of company is at Bharuch and the accused had procured the loan from the bank having the branch at Surat.

4. The learned APP, Mr. S.P. Dave taking me to the

entire record contends that there is no justifiable reason to allow this petition and quash the complaint. Prima facie, when commission of the criminal wrong prima facie, appears to have been made out, this Court should not come in the way and allow the complaint to have its normal end before the lower Court.

5. The record shows that the learned advocate engaged by the opponent No.2 does not appear and has many a times abstained from appearance before this Court as a result of which the matter is unnecessarily prolonged. Today also, Mr. Dalal, learned advocate representing the State Bank of Saurashtra is not present. In his absence the matter is heard as I do not find any good reason to adjourn the matter and wait for him.

6. The application is filed under Section 482 of the Criminal Procedure Code. Under that Section, the powers vested in this Court are discretionary and the same are to be exercised sparingly. The proceedings against the accused in the initial stage can be quashed exercising the powers under Section 482 of the Criminal Procedure Code only if on the face of the complaint or the papers accompanying the same no offence is even prima facie constituted. In other words, taking the allegations and the complaint as they are without adding or subtracting anything, if no offence is made out the High Court will be justified in quashing the proceeding in the exercise of its power under Section 482. Whether in this case the averments made in the complaint prima facie constitute the commission of any of the offences is to be examined. The facts pleaded in the complaint are in short stated hereinabove. I will not, therefore, repeat those facts again. It is clear, reading the complaint that the accused running their factory in the name and style Jigma Syntex Pvt.Ltd., at Ankleshwar in Bharuch district having their administrative office at Surat were given certain facilities by the bank and in turn the abovereferred goods and machineries were hypothecated with the Bank. Thereafter as alleged the accused committed the wrong which the bank believed to be the criminal wrong and therefore the complaint is filed simultaneously initiating the civil action for the realization of the amounts running into lakhs of rupees. When the goods are hypothecated with the bank and they are disposed of by the person taking the loan or enjoying the credit facilities, whether the same would amount to the offence of breach of trust was the question arose before the Supreme Court in the case of Central Bureau of Investigation, SPE, SIU(X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta - 1996 S.C.C. (Cri.) 1045

wherein dealing with all the relevant provisions, the Supreme Court has observed that in order to decide whether the offence of criminal breach of trust is constituted or not, the expression "entrusted with property" or "within any dominion over the property" should be borne in mind as they are used in wider sense in Section 405, Indian Penal Code. Such expression includes all cases in which goods are entrusted, i.e., voluntarily handed over for specific purpose and dishonestly disposed of in violation of law or in violation of contract. In the case of criminal breach of trust, the entrustment of the property or dominion over the property and dishonest disposal of the property in violation of the law or contract being the essential ingredient must appear to have been satisfied prima facie. The ownership of the property entrusted must be in another person and not the accused and the accused must hold it on account of some person, may be the owner and in some way for the benefit. When some goods are hypothecated by a person to another person, the ownership of the goods still remains with the person who has hypothecated such goods. The property, in respect of which criminal breach of trust can be committed, must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in the other person and the offender must hold such property in trust for such other person or for his benefit. In case of pledge or pledged article belongs to some other person but the same is kept in the trust by the pledgee where there is a floating charge is made on the goods by way of security to cover up credit facility, and in that case if the goods are disposed of covering the security against the credit facility, the offence of criminal breach of trust is not committed for entrustment and dominion, the essential ingredients constituting the offence are lacking in that case.

7. In this case, when the goods are hypothecated, the dominion or entrustment in favour of the bank, in view of the abovestated decision of the Supreme Court, cannot be said to have taken place. The dominion over the property remained with the petitioner and the other accused and they also remained to be the real owners of the goods. Simply because the goods were hypothecated, it cannot be said that they lost the ownership and dominion over the property to deal with the same in the way they liked. There is therefore no offence which can be said to have been constituted under Section 406 of the Indian Penal Code. The Bank had, in other words, I may say, had not entrusted the goods and pledged the goods under the dominion of the accused. When accordingly, in

view of the Supreme Court decision, it appears that even prima facie the offence of breach of trust is not committed, there is no reason to keep the complaint alive for any of the offences against petitioner or either of the accused and allow to reach its normal end.

8. So far as the offence of cheating is concerned, the averments made in the complaint do not constitute the offence. To constitute the offence of cheating, it is necessary to state that the accused by deceiving fraudulently or dishonestly induced the other person so deceived to deliver any property to any person or to consent that any person shall retain the property; or intentionally inducing the person so deceived to do or omit to do anything which he would not do or omit if he were not deceived. The dishonest deception must be at the time when the person delivers the property or intentional inducement to do or omit to do anything at the time of offence has to be considered. Subsequent change in the mind of the accused and contemplating dishonest plan in the mind regarding the transaction entered into will not constitute the offence of cheating. The Supreme Court has also in the above referred case of Central Bureau of Investigation, New Delhi, has made it clear that two essential ingredients of the offence of cheating namely (i) to make a false statement so as to deceive a person; and (ii) fraudulently and dishonestly inducing that person to deliver any property or to do or omit to do something must be present. Reading the complaint, nowhere any reference to any false representation having been made so as to induce the bank to grant the cash credit facilities, appears. What appears is that the bank sets the eyes on the later on development. Subsequently, as alleged the petitioner and other accused dishonestly and fraudulently started submitting statements of goods and book debts irregularly and thereafter stopped sending the same since 15th August 1989. Not only that, they also later on dishonestly submitted the false statement showing inflated values of goods, book debts etc. At the time when the petitioner and accused went to the bank for cash credit & other facilities, dishonest deception or inducement was not conceived because the bank has in clear terms stated that after the grant of the facilities in March 1988 some statements it received in order but later on from August 1989 the bank found that the statements were not showing the true and correct facts and were showing the inflated value and quantity of the goods. The Bank has thus come out with the case that in the subsequent dealings artifice to deceive could be discerned. When that is the case it can be said that the two essential ingredients

mentioned hereinabove are certainly lacking in this case. The offence of cheating punishable under Section 420 I.P. Code therefore cannot be said to have been even prima facie made out. I will now switch over to the allegation about offence of mischief.

9. The bank is coming out with the case that the petitioner and other accused used the machinery of the factory for job work and thereby they caused titanic loss to the bank because while using the petitioner & other accused were knowingly well that by their such use the value and utility of the machinery would be considerably diminished. Such allegation will not, in my view, constitute the offence as alleged. If intentionally the person is causing damage to the property or knowing that he is likely to cause damage to the property, or any situation thereof or destroys or diminishes its value or utility can be said to have committed the offence of mischief but if for the purpose of production in good faith the machinery is used, it would not fall within the ambits of the offence of mischief. On the contrary, by using the machinery for the purpose for which the same is to be used would enhance its utility rather than diminishing the same. When in this case, therefore, the machineries are being used for job work for which the same are meant, by no stretch of imagination also one can conclude that thereby its utility will be diminished and the machinery would be rendered useless. In that case, the offence of mischief will not be constituted. Considering the averments made in the complaint and in view of the matter, it can hardly be said that the petitioner or the other accused are fraudulently preventing the machinery from being made available to the bank. On going through the complaint with care, nowhere I find any thing indicating fraudulent removal or concealment of the property. If the goods produced are taken out of the factory for the purpose of sale and also with a view to satisfy the debt of the bank after getting the sale consideration, it will not amount to offence of mischief. The statements of stock and book debts are also supplied if not regularly a little late, and hence it cannot be said that there is fraudulent removal or concealment of property to prevent distribution amongst creditors. The officers of the bank often visit the factory premises and check records. In view of the matter, neither of the offences alleged appears to have been prima facie constituted even if the case alleged in the complaint is on its face value accepted without any comment or remarks. It seems to have a short cut for remedying the civil wrong the bank has filed the complaint.

10. For the aforesaid reasons when neither of the offences alleged in the complaint appears to have been prima facie constituted, the complaint is required to be quashed. The application is therefore allowed and Criminal Case No. 6998/92 at present pending in the Court of Judicial Magistrate (F.C.) at Surat is hereby quashed. Rule accordingly made absolute.

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(rmr).